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Utah Supreme Court

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In the Supreme Court of the State of Utah

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1958

Clark, Supreme Court, Utah

M. S. COSTELLO,

Respondent,

vs.

JOHN I. KASTELER, and URANIUM
CHEMICAL CORPORATION, a Cor-
poration,

Appellants.

Case

No. 8759

UNIVERSITY, UTAH

MAY 3 1958

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BRIEF OF APPELLANTS

BENJAMIN SPENCE

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In the Supreme Court of the State of Utah

M. S. COSTELLO,

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BRIEF OF APPELLANTS

STATEMENT OF FACTS

The defendant John I. Kasteler is the president of the defendant corporation, the Uranium Chemical Corporation, which corporation is engaged in the business of manufacturing and selling fertilizer, with its place of business in Midvale, Utah.

Sometime in the early part of October 1956, Mr. Kasteler and the respondent had negotiations over the telephone with

respect to the employment of the respondent by the appellants, for the purpose of transporting the respondent's backhoe up to Alta in the Cottonwood district for the purpose of loading trucks, to be furnished by the appellants with certain material the appellants were mining for the purpose of manufacturing fertilizer.

Some three or four conversations were had by these respective parties over the telephone with relations to employment and the price to be charged. It is the contention of the respondent that he was hired on the basis of \$1.50 per ton for loading, and it is the contention of the appellants that the respondent was hired on the basis of \$15.00 per hour (Tr. 24-25-26) (Tr. 47-48).

Pursuant to these conversations between Appellant and Respondent, the Respondent, on or about the 11th day of October 1956, transported his $\frac{3}{4}$ backhoe up to Alta, and during a working period of approximately 27 hours loaded the material on trucks for the appellants in an amount of 770 tons (Tr. 36).

Just after the completion of the job the appellant tried to contact the respondent to pay him for his services, but could not make contact with the respondent until sometime later (Tr. 49). When they finally got together the respondent refused to take a tender by appellants of \$15.00 per hour and insisted that the agreement was at the rate of \$1.50 per ton (Tr. 49-50), which the appellants refused to pay, contending that the agreement was \$15.00 per hour (Tr. 49-50). The respondent refused to accept the tender of \$15.00 per hour and subsequently instituted suit against the appellants, first by com-

mencing suit against the appellant John I. Kasteler and then by amended complaint against John I. Kasteler and the Uranium Chemical Corporation on the theory of an express contract of \$1.50 per ton. The matter came to trial before the Honorable Aldon Anderson, Judge of the Third Judicial District Court of Salt Lake County, and judgment was rendered in favor of the respondent and against the appellants on the basis of the reasonable value of \$1.50 per ton for 770 tons, less 125 tons allowed as a set off for earth excavated by respondent contrary to instructions, or a total of \$1,024.13 including interest (Tr. 70-71-72), from which judgment the appellants take this appeal.

At the trial of this cause, when the respective parties announced their readiness for trial, counsel for respondent made a motion to amend respondent's amended complaint by interlineation by adding the words, both in the complaint and in the prayer of the complaint, "or for the reasonable value thereof," which amendment was permitted by the court over the objections of the appellants, but if allowed, the appellant was not prepared to meet the issues of reasonable value, as it was the contention of the appellants that the complaint was based on an express contract and not upon the reasonable value of the services.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN PERMITTING THE RESPONDENT TO AMEND HIS AMENDED COMPLAINT

BY INTERLINEATION TO CHANGE HIS CAUSE OF ACTION FROM ONE OF AN EXPRESS CONTRACT TO ONE OF REASONABLE VALUE FOR SERVICES.

POINT II. .

THE COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF THE RESPONDENT AND AGAINST THE APPELLANTS FOR THE SUM OF \$967.50 TOGETHER WITH INTEREST THEREON ON THE BASIS OF THE REASONABLE VALUE OF SAID SERVICES.

POINT III.

THE COURT ERRED IN RENDERING JUDGMENT AGAINST THE DEFENDANTS, JOHN I. KASTELER AND URANIUM CHEMICAL CORPORATION, JOINTLY AND SEVERALLY.

ARGUMENT

POINT I.

THE COURT ERRED IN PERMITTING THE RESPONDENT TO AMEND HIS AMENDED COMPLAINT BY INTERLINEATION TO CHANGE HIS CAUSE OF ACTION FROM ONE OF AN EXPRESS CONTRACT TO ONE OF REASONABLE VALUE FOR SERVICES.

It is the contention of the appellants in this matter that the respondent proceeded against the appellants upon the

theory of an express contract, to-wit, that the defendants owe the plaintiff the sum of \$1,155.00 pursuant to the terms of an oral agreement between plaintiff and defendants, wherein the defendants agreed to pay plaintiff \$1.50 per ton for excavation and loading in trucks of certain earth. The foregoing allegations were contained in both the original complaint filed by the plaintiff against the defendant, John I. Kasteler, and in the amended complaint in the first and second causes of action against the defendants, John I. Kasteler and the defendant Uranium Chemical Corporation, with the further allegations contained therein, "That the agreed value and the reasonable value of said services is the sum of \$1,155.00" (Tr. 1-8-9).

The allegations therein contained are not in the alternative but in the conjunctive, and pursuant thereto the defendants proceeded to trial upon the election of the plaintiff therein to proceed on the theory of an express contract, and not upon the theory of the reasonable value of said services.

At the trial of the issues in said matter, upon motion of the plaintiff and over the objections of the defendants, the court permitted the plaintiff to amend his amended complaint by interlineation to insert the following words both in the complaint and in the prayer of the complaint, to-wit: "or the reasonable value of said services." This was done over the objections of the defendants, upon the grounds, that if the plaintiff could not sustain his allegations of an express contract, then to permit him to proceed upon the theory of the reasonable value thereof. The defendants were not prepared to rebut the testimony of reasonable value, and requested

further time to prepare to meet this issue, which the court denied and permitted the amendment (Tr. 16-17).

It is the contention of the appellants that the court erred in permitting this amendment and forcing the defendants to trial at the time this amendment was allowed, and in support of this contention we quote the following principals of law:

71 C. J. S. at page 496, Par. 281:

"No party should be called into court prepared to try one issue and then be required to try another, of which he then for the first time has notice and the discretion of the court should be exercised so as to prevent surprise."

100 Pac. 848. Bowers et ux, v. Good et ux., Washington:

"The fact that the amendment may introduce a new issue is not alone grounds for denying it. The true test is found in the answer to the question, is the opposing party prepared to meet the issue? His remedy therefor, when a new issue is sought to be presented, by an amendment, is not to object to it merely, but to show in addition that he is unprepared to meet the new issue. In such a case the trial court will in its discretion either continue the case in order to allow him to prepare for trial of the new issue or deny the right to amend."

71 C. J. S. page 602, Paragraph 282:

"On the other hand under the general rule that an amendment will be refused where it would be prejudicial to the rights of the adverse party, an amendment at the trial will not be allowed where it would so result. The opposing party will be granted an opportunity to make a showing for a continuance, if surprised by an amendment allowed at the trial."

Safe-Way Cab Service Co. of Oklahoma City v. Gadberry,
27 Pac. 2nd. 434. Oklahoma.

“Amendment should not be permitted where a surprise is worked against a party, or where to permit the amendments works a departure.”

We are not unmindful of the fact that amendments are liberally permitted by the court in furtherance of justice. This is elementary law. For that reason we do not deem it necessary to quote numerous decisions in that respect, as we think what we have referred to hereinabove is a good example of what the law is in this respect, but we do contend that in the instant case, and within the sound discretion of the court the amendment herein allowed by the court should not have been permitted over our objection, simply for the reason that the appellants came into court on the theory of an express contract and not upon the theory of the reasonable value of the services of the plaintiff. The appellants were not prepared to meet this issue as shown by the objection of the appellant's counsel (Tr. 16-17).

The evidence in this case quite conclusively shows that there was no meeting of the minds on the proposed contract of employment, and if that is a fact the court could not have reached a decision only upon the principal of the reasonable value of the services rendered by the plaintiff therein.

In support of this contention we refer to the plaintiff's evidence as follows:

Q. What did he say to you with respect to this employment?

A. He said he had the trucks ready to go, it was just a matter of him and I getting together on my price for loading (Tr. 23).

To sustain the appellants' position that the court undoubtedly decided this case upon the theory of the reasonable value of the services and not upon an express contract we quote further from the evidence:

Q. How long have you been in the excavating and loading business, Mr. Costello?

A. I guess since '42.

Q. Were you aware of the prices charged in this area?

Objection to this question made by counsel for appellants upon the basis that it does not come within the issue of the pleadings.

Objection overruled by the court.

Q. I was asking you, Mr. Costello, if you are aware of the prevailing and usual prices charged by excavators in this area for excavating dirt and loading it into trucks.

A. Yes (Tr. 28.)

The court then interrupted the plaintiff and asked that his testimony be limited to his services of taking his equipment to Alta and loading the material, and plaintiff was then asked:

Q. Listen to the question . . . I asked if you had an opinion what the reasonable value of the service would be and you said 'Yes.' What value do you think the service would be worth?

A. I still say a dollar and a half.

Q. A ton?

A. Yes (Tr. 29-30).

Upon cross-examination the plaintiff testified that he and the defendant, John I. Kasteler, had several conversations about the employment (Tr. 31), and the plaintiff admits that the price he quoted was not accepted by the defendants, but regardless of that he went on the job (Tr. 32-33).

Q. You didn't in that conversation arrive at any definite arrangement about your charge?

A. No.

Q. It all summed up then, and you finally talked to him the night before you left. You argued about the price per ton and the price per hour, did you not?

A. Yes.

Q. He told you to sleep on it?

A. I said, "I will sleep on it but it is still my price."

Q. Now the next day you left and went up, didn't you?

A. Yes.

Q. Without saying anything more to him as to whether he accepted the dollar and a half an hour, or not, is that right?

A. As far as I was concerned he had accepted.

Q. With that understanding you went up?

A. Yes.

Q. Without any further conversation?

A. Yes (Tr. 32-33).

Q. When you said it would be one dollar and a half a ton, did he agree to it?

A. No, we hung up. That is the conversation (Tr. 34-34).

In view of the questions and answers on the part of the plaintiff and other similar questions and answers, it would appear to us that there was no meeting of the minds of these parties on the price. In view of the testimony it is quite apparent that Mr. Kasteler understood this was to be done by the hour at the rate of \$15.00 per hour. In view of the unforeseen difficulties enumerated by the plaintiff as to what he would run into, the more logical reasoning would be that the hourly basis would be more advantageous to the plaintiff.

The job, however, went very smoothly and no difficulties were encountered. Plaintiff worked some thirty-seven hours including coming and going to the job.

Q. This job went unusually smoothly?

A. Yes, we had no idea it was going to go that smooth (Tr. 42).

Plaintiff further testified that he could load some 75 tons per hour as long as he had no interruptions (Tr. 37). At that rate he would be earning \$112.50 per hour at \$1.50 per ton, less of course his time for transportation and setting up.

POINT II.

THE COURT ERRED IN RENDERING JUDGMENT IN FAVOR OF THE RESPONDENT AND AGAINST THE APPELLANTS FOR THE SUM OF \$967.50 TOGETHER WITH INTEREST THEREON ON THE BASIS OF THE REASONABLE VALUE OF SAID SERVICES.

We are not unmindful of the fact that this court is reluctant to disturb the decision of the District or trial court,

when the decision is based upon a question or finding of fact, but we are of the opinion that the decision in this case was not justified, in view of the fact that there was no meeting of minds with relation to the price to be charged, and the further fact of the court permitting an amendment to the amended complaint of the plaintiff at the time of trial when the defendants were not able to produce other witnesses as to the value of the services, and over the objections of the defendants, or granting to defendants sufficient time to meet this issue (Tr. 16-17).

The court, apparently, entirely ignored the testimony of the defendant Kasteler when he testified at what rate he had the job done two years previous (Tr. 51). Defendants had no opportunity to produce other competent witnesses to rebut the testimony of the reasonable value of the services, upon which the decision of the court was based, pursuant to the findings of fact of the court.

POINT III.

THE COURT ERRED IN RENDERING JUDGMENT AGAINST THE DEFENDANTS, JOHN I. KASTELER AND URANIUM CHEMICAL CORPORATION, JOINTLY AND SEVERALLY.

This action was commenced originally by the plaintiff against the defendant, John I. Kasteler (Tr. 1). After the defendant, John I. Kasteler, filed his answer, the plaintiff then, by stipulation of the parties, filed an amended complaint, (Tr. 7-8-9-10), making both John I. Kasteler and the Uranium

Chemical Corporation parties defendant and proceeded against both of them.

The law is well settled that where one deals with an agent of an undisclosed principal, and the contract so entered into is for the use and benefit of the principal, he may elect to hold either the agent personally or the principal, but he cannot hold them both, hence the court erred in this case by not requiring the plaintiff to elect which of the defendants in this case he intended to charge with this obligation.

The plaintiff testified that Mr. Kasteler in making contact with the plaintiff did not disclose that he was connected with the Uranium Chemical Corporation, and pursued to sue him individually originally (Tr. 18-19) and (Tr. 1).

Mr. Kasteler testified that the plaintiff knew that he was President of the Alta United Mines, the owner of the deposit, and that he had been so informed previously to this transaction (Tr. 52).

In view of the foregoing it is incumbent upon the plaintiff to elect which of these defendants he would hold responsible for this indebtedness.

In support of this contention, that the plaintiff cannot hold both of these defendants, we quote the following:

Love et al v. St. Joseph Stock Yards Co., 169 Pac. 951, Utah.

“Upon that finding the court made a conclusion of law that in settling with said Wilson the appellants had released all of the defendants, including the respondent. The law seems to be well settled that, in case of an undisclosed principal, the plaintiff may either

sue the agent or the principal, but cannot obtain judgment against both. Moreover, if the plaintiff knows that there was an undisclosed principal, and he nevertheless elects to sue the alleged agent, he can thereafter not pursue the undisclosed principal, since he has elected to treat the alleged agent as the principal. *Lindquist v. Dickson*, 98 Minn. 369, 107 N. W. 958, 6 L.R.A.N.S. 729, 8 Ann. Cas. 1024.

Ewing v. Hayward et al., 195 Pac. 970. California:

"Plaintiff, who is seeking to hold the Newmark Grain Company liable as an undisclosed principal, is not entitled to a judgment against that defendant and the other defendants also. When one party to the contract deals with another as principal and afterward discovers that such party was in fact agent for an undisclosed principal, he may elect to hold either the agent, or, upon discovery, the principal; but he cannot hold both. The agent is liable because credit was originally extended to him in the belief that he was acting for himself. The undisclosed principal is liable on the theory that, having received the benefit of the contract made by his agent, he should assume its burdens. There is but one contract upon which the plaintiff in such an action can bring suit . . . There is, as we have said, but one contract in such cases. And though the plaintiff may elect to hold either one of two persons liable on that contract, either the agent or his undisclosed principal, he cannot make two contracts out of the one contract by seeking to hold each of those two persons liable severally as an independent obligor. Nor can he hold them both liable as joint obligors on one contract. . . .

So we find that, according to the weight of authority, it becomes the duty of the creditor, after disclosure of the agency and the identity of the principal, to elect which of the two he will look to carry out the agree-

ment of the agent. Note to *Murphy v. Hutchinson*, 21 L. R. A. N. S. 786.

The plaintiff, as perhaps it had the right to do, brought the action against the agent and the alleged undisclosed principal. The lower court instead of requiring plaintiff to make an election at the close of the case to take judgment against the agent or against the alleged undisclosed principal, the Newmark Grain Company, entered judgment against both. This, I think, is grounds for reversal. *Sessions vs. Block*, 40 Mo. App. 569; *Pittsburg Plate Glass Co. v. Roquemore*, 88 S. W. 449; *Wells v. Raymond*, 7. N. E. 860; *Tuthill v. Wilson*, 90 N. Y. 423.

Gill vs. White, 106 So. 166-67. (Ala.)

“Where one contract merely as the agent of a disclosed principal, he binds either his principal or himself, but not both; and a joint action against both involves a practical as well as a legal anomaly.”

In accordance with the foregoing decisions, it may be properly correct that both Mr. Kasteler as the agent of the Uranium Chemical Corporation, and the Uranium Chemical Corporation may be parties defendant to determine which is liable if at all, but upon discovery of this fact, the plaintiff must elect whom he will hold. This he failed to do, and by reason of that the judgment should be reversed.

CONCLUSION

The appellants respectfully submit that the trial court erred in permitting the plaintiff to amend his complaint at the trial of this case in order to prove the issues on the basis of the reasonable value of the services rendered, when the

complaint and the allegations therein contain a cause of action on an express contract. The court further erred in not permitting a continuance of the trial of the case for the purpose of enabling the defendants to procure witnesses, other than the defendant Kasteler, to testify to the value of said services, and permitting the plaintiff to take judgment against the defendants on the value of said services rather than on the specific contract alleged, as disclosed by the findings of fact of the court.

We respectfully submit that the judgment should also be reversed upon the grounds that the plaintiff could not take judgment against both of the defendants, when in fact the plaintiff proceeded upon the cause against the defendant Kasteler, and by the plaintiff's testimony he did business with Mr. Kasteler, and not with the Uranium Chemical Corporation, although the contract was made between plaintiff and Kasteler for the use and benefit of the defendant Uranium Chemical Corporation, and not for the use and benefit of Mr. Kasteler.

Respectfully submitted,

BENJAMIN SPENCE

Attorney for Appellants.